

Order

Michigan Supreme Court
Lansing, Michigan

November 25, 2008

Clifford W. Taylor,
Chief Justice

ADM File No. 2005-05

ADM File No. 2006-20

Michael F. Cavanagh
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Justices

Proposed Amendment of
Rules 2.403, 2.404, 2.410, 2.411
and 3.216 of the Michigan Court Rules

On the order of the Court, this is to advise that the Court is considering amendment of Rules 2.403, 2.404, 2.410, 2.411, and 3.216 of the Michigan Court Rules. **Please note that the order contains alternative options for the proposed language of MCR 2.403(M)(1) on pages 4 and 5 of this order.** Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at www.courts.michigan.gov/supremecourt.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Additions are indicated by underlining and deletions are indicated by strikeover.]

Rule 2.403 Case Evaluation

(A) Scope and Applicability of Rule.

(1) [Unchanged.]

(2) Case evaluation of tort cases filed in circuit court is mandatory beginning with actions filed after the effective dates of Chapters 49 and 49A of the Revised Judicature Act, as added by 1986 PA 178; ~~however, the court may except an action from case evaluation on motion for good cause shown if it finds that case evaluation of that action would be inappropriate.~~

(3) A court may except all or part of an action from case evaluation for good cause shown on motion or by stipulation of the parties, or by the court with

the consent of the parties, if it finds that case evaluation of that action or part thereof would be inappropriate.

(4) [Renumbered but unchanged.]

(B) Selection of Cases.

- (1) The judge to whom an action is assigned or the chief judge may select it for case evaluation by written order ~~no earlier than 91 days~~ after the filing of the answer
 - (a) on written stipulation by the parties,
 - (b) on written motion by a party, or
 - (c) on the judge's own initiative.
- (2) Selection of an action for case evaluation has no effect on the normal progress of the action toward trial.

(C)-(G)[Unchanged.]

(H) Fees.

- (1) ~~Within 14 days after the mailing of the notice of the case evaluation hearing, unless otherwise ordered by the court, e~~Each party must send to ~~the ADR clerk~~ a check for ~~\$75~~\$150 made payable in the manner and within the time specified in the notice of the case evaluation hearing. However, if a judge is a member of the panel, the fee is ~~\$50~~\$100. If the order for case evaluation directs that payment be made to the ADR clerk, Tthe ADR clerk shall arrange payment to the case evaluators. Except by stipulation and court order, the parties may not make any other payment of fees or expenses to the case evaluators than that provided in this subrule.
- (2) Only a single fee is required of each party, even where there are counterclaims, cross-claims, or third-party claims. A person entitled to a fee waiver under MCR 2.002 is entitled to a waiver of fees under this rule.
- (3) If one claim is derivative of another (e.g., husband-wife, parent-child) they must be treated as a single claim, with one fee to be paid and a single award made by the case evaluators.
- (4) ~~In the case of multiple injuries to members of a single family, the plaintiffs~~

~~may elect to treat the action as involving one claim, with the payment of one fee and the rendering of one lump sum award to be accepted or rejected. If no such election is made, a separate fee must be paid for each plaintiff, and the case evaluation panel will then make separate awards for each claim, which may be individually accepted or rejected.~~

~~(4)~~(5) Fees paid pursuant to subrule (H) shall be refunded to the parties if

- (a) the court sets aside the order submitting the case to case evaluation or on its own initiative adjourns the case evaluation hearing, or
- (b) the parties notify the ADR clerk in writing at least 14 days before the case evaluation hearing of the settlement, dismissal, or entry of judgment disposing of the action, or of an order of adjournment on stipulation or the motion of a party.

~~In the case of an adjournment, the fees shall not be refunded if the adjournment order sets a new date for case evaluation. If case evaluation is rescheduled at a later time, the fee provisions of subrule (H) apply regardless of whether previously paid fees have been refunded. Penalties for late filing of papers under subrule (I)(2) are not to be refunded.~~

(5) Fees paid pursuant to subrule (H) shall not be refunded to the parties if

- (a) in the case of an adjournment, the adjournment order sets a new date for case evaluation and the fees are applied to the new date, or
- (b) the request for and granting of adjournment is made within 14 days of the scheduled case evaluation, unless waived for good cause.

Penalties for late filing of papers under subrule (I)(2) are not to be refunded.

(I) Submission of Summary and Supporting Documents.

- (1) ~~Unless otherwise provided in the notice of hearing, At least 14 days before the hearing, each party shall file with the ADR clerk 3 copies of documents pertaining to the issues to be mediated and 3 copies of a concise summary setting forth that party's factual and legal position on issues presented by the action, and shall serve one copy of the documents and summary on each attorney of record. A copy of a proof of service must be attached to the copies filed with the ADR clerk.~~

- (a) serve a copy of the case evaluation summary and supporting

documents in accordance with MCR 2.107; and

(b) file a proof of service and three copies of a case evaluation summary and supporting documents with the ADR clerk.

(2) Each ~~F~~failure to timely file and serve the required materials identified in subrule (1), with the ADR clerk or to serve copies on each attorney of record by the required date and each subsequent filing of supplemental materials within 14 days of the hearing, subjects the offending attorney or party to a \$150 penalty to be paid in the manner specified in the notice of the case evaluation hearing. An offending attorney shall not charge the penalty to the client, unless the client agreed in writing to be responsible for the penalty.

(3) The case evaluation summary shall consist of a concise summary setting forth that party's factual and legal position on issues presented by the action. Except as permitted by the court, the summary shall not exceed 20 pages double spaced, exclusive of attachments. Quotations and footnotes may be single spaced. At least one-inch margins must be used, and printing shall not be smaller than 12-point font.

(J) [Unchanged.]

(K) Decision.

(1) [Unchanged.]

(2) Except as provided in subrule (H)(3), the evaluation must include a separate award as to ~~the~~ each plaintiff's claim against each defendant and as to each cross-claim, counterclaim, or third-party claim that has been filed in the action. For the purpose of this subrule, all such claims filed by any one party against any other party shall be treated as a single claim.

(3)-(5)[Unchanged.]

(L) [Unchanged.]

(M) Effect of Acceptance of Evaluation.

******Alternative A******

(1) If all the parties accept the panel's evaluation, judgment will be entered in accordance with the evaluation, unless the amount of the award is paid

within 28 days after notification of the acceptances, in which case the court shall dismiss the action with prejudice. The judgment or dismissal shall be deemed to dispose of all claims in the action and includes all fees, costs, and interest to the date it is entered. The judgment or dismissal shall not be deemed to dispose of claims that have not accrued as of the date of the case evaluation hearing, including cases involving rights to personal protection insurance benefits under MCL 500.3101 et seq.

******Alternative B******

- (1) If all the parties accept the panel's evaluation, judgment will be entered in accordance with the evaluation, unless the amount of the award is paid within 28 days after notification of the acceptances, in which case the court shall dismiss the action with prejudice. The judgment or dismissal shall be deemed to dispose of all claims in the action and includes all fees, costs, and interest to the date it is entered, except for cases involving rights to personal protection insurance benefits under MCL 500.3101 et seq, for which judgment or dismissal shall not be deemed to dispose of claims that have not accrued as of the date of the case evaluation hearing.
- (2) If only a part of an action has been submitted to case evaluation pursuant to subrule (A)(3) and all of the parties accept the panel's evaluation, the court shall enter an order disposing of only those claims.
- (3) [Renumbered but unchanged.]
- (N) [Unchanged.]
- (O) Rejecting Party's Liability for Costs.
- (1)-(4)[Unchanged.]
- (5) If the verdict awards equitable relief, costs may be awarded if the court determines that
 - (a) taking into account both monetary relief (adjusted as provided in subrule [O][3]) and equitable relief, the verdict is not more favorable to the rejecting party than the evaluation or, in situations where both parties have rejected the evaluation, the verdict in favor of the party seeking costs is more favorable than the case evaluation, and
 - (b) it is fair to award costs under all of the circumstances.

- (6) [Unchanged.]
- (7) Costs shall not be awarded if the case evaluation award was not unanimous. If case evaluation results in a nonunanimous award, a case may be ordered to a subsequent case evaluation hearing conducted without reference to the prior case evaluation award, or other alternative dispute resolution process, at the expense of the parties, pursuant to MCR 2.410(C)(1).
- (8)-(11)[Unchanged.]

Rule 2.404 Selection of Case Evaluation Panels

- (A) [Unchanged.]
- (B) Lists of Case Evaluators.
 - (1)-(4)[Unchanged.]
 - (5) *Reapplication.* Persons shall be placed on the list of case evaluators for a fixed period of time, not to exceed seven 5 years, and must reapply at the end of that time in the ~~same~~ manner directed by the court as persons seeking to be added to the list.
 - (6)-(8)[Unchanged.]
- (C) [Unchanged.]
- (D) Supervision of Selection Process.
 - (1) The chief judge shall exercise general supervision over the implementation of this rule and shall review the operation of the court's case evaluation plan at least annually to assure compliance with this rule. In the event of non-compliance, the court shall take such action as is needed. This action may include recruiting persons to serve as case evaluators or changing the court's case evaluation plan. ~~The court shall submit an annual report to the State Court Administrator on the operation of the court's case evaluation program on a form provided by the State Court Administrator.~~
 - (2) [Unchanged.]

Rule 2.410 Alternative Dispute Resolution

- (A) [Unchanged.]

(B) ADR Plan.

(1)-(2)[Unchanged.]

(3) The plan may also provide for referral relationships with local dispute resolution centers, including those affiliated with the Community Dispute Resolution Program. In establishing a referral relationship with centers or programs, courts, at a minimum, shall take into consideration factors that include whether parties are represented by counsel, the number and complexity of issues in dispute, the jurisdictional amount of the cases to be referred, and the ability of the parties to pay for dispute resolution services. The plan must preserve the right of parties to stipulate to the selection of their own mediator under MCR 2.411(B)(1).

(4) [Unchanged.]

(C) Order for ADR.

(1) At any time, ~~after consultation with the parties,~~ the court may order that a case be submitted to an appropriate ADR process. More than one such order may be entered in a case.

(2)-(3)[Unchanged.]

(D)-(F) [Unchanged.]

Rule 2.411 Mediation

(A) [Unchanged.]

(B) Selection of Mediator.

(1)-(3)[Unchanged.]

(4) The court shall not appoint, recommend, direct, or otherwise influence a party's or attorney's selection of a mediator except as provided pursuant to this rule. The court may recommend or advise parties on the selection of a mediator only upon request of all parties by stipulation in writing or orally on the record.

(4)(5) [Renumbered but unchanged.]

(C) [Unchanged.]

(D) Fees.

- (1) A mediator is entitled to reasonable compensation ~~based on an hourly rate~~ commensurate with the mediator's experience and usual charges for services performed.

(2)-(5)[Unchanged.]

(E) List of Mediators

- (1) *Application.* ~~An eligible person desiring to~~ To appear on a roster serve as a mediator, an applicant may apply to the ADR clerk to be placed on the court's list of mediators. Application forms shall be available in the office of the ADR clerk.

- (a) The form shall include a certification that

- (i) the applicant meets the requirements for service under the court's selection plan;
- (ii) the applicant will not discriminate against parties or attorneys on the basis of race, ethnic origin, gender, or other protected personal characteristic; and
- (iii) the applicant ~~mediator~~ will comply with the court's ADR plan, orders of the court regarding cases submitted to mediation, and the standards of conduct adopted by the State Court Administrator under subrule (G).

- (b) The applicant shall indicate on the form the applicant's ~~hourly~~ rate for providing mediation services.

- (c) The form shall include an optional section identifying the applicant's gender and racial/ethnic background.

- (d) A Community Dispute Resolution Program center may appear on a roster of mediators, provided that the center selects only mediators who meet the qualifications of this rule or training requirements established by the State Court Administrator to mediate cases ordered by the court.

(2) *Review of Applications.* The court's ADR plan shall provide for a person or committee to review applications annually, or more frequently if appropriate, and compile a list of qualified mediators.

- (a) ~~Persons~~ Applicants meeting the qualifications specified in this rule shall be placed on the list of approved mediators. Approved mediators shall be placed on the list for a fixed period, not to exceed 5 seven years, and must reapply at the end of that time in the ~~same manner as persons seeking to be added to the list~~ directed by the court.
- (b) Selections shall be made without regard to race, ethnic origin, or gender. Residency or principal place of business may not be a qualification.
- (c) The approved list and the applications of approved mediators, except for the optional section identifying the applicant's gender and racial/ethnic background, shall be available to the public in the office of the ADR clerk.
- (d) An applicant may attach a résumé or biographical information to the application.

(3)-(4)[Unchanged.]

(F) Qualifications of Mediators.

(1) [Unchanged.]

(2) General Civil Mediation. To be eligible to serve as a general civil mediator, a person must meet the following minimum qualifications:

(a)-(b) [Unchanged.]

- (c) Upon completion of the training required under subrule (F)(2)(a), ~~Observe~~ two general civil mediation proceedings conducted by an approved mediator, and conduct one general civil mediation to conclusion under the supervision and observation of an approved mediator.

(3)-(5)[Unchanged.]

(G) [Unchanged.]

Rule 3.216 Domestic Relations Mediation

(A)-(D)[Unchanged.]

(E) Selection of Mediator.

(1)-(2)[Unchanged.]

(3) If the parties have not stipulated to a mediator:

(a) the parties must indicate whether they prefer a mediator who is willing to conduct evaluative mediation. Failure to indicate a preference will be treated as not requesting evaluative mediation.

~~(b)(4) If the parties have not stipulated to a mediator, the judge may recommend, but not appoint one. If the judge does not make a recommendation, or if the recommendation is not accepted by the parties, the ADR clerk will assign a mediator from the list of qualified mediators maintained under subrule (F). The assignment shall be made on a rotational basis, except that if the parties have requested evaluative mediation, only a mediator who is willing to provide and evaluation may be assigned.~~

(4) The court shall not appoint, recommend, direct, or otherwise influence a party's or attorney's selection of a mediator except as provided pursuant to this rule. The court may recommend or advise parties on the selection of a mediator only upon request of all parties by stipulation in writing or orally on the record.

(5) [Unchanged.]

(F) List of Mediators.

(1) *Application.* ~~An applicant eligible person desiring to serve as a domestic relations mediator~~ may apply to the ADR clerk to be placed on the court's list of mediators. Application forms shall be available in the office of the ADR clerk.

(a) The form shall include a certification that

(i) the applicant meets the requirements for service under the court's selection plan;

- (ii) the applicant will not discriminate against parties or attorneys on the basis of race, ethnic origin, gender, or other protected personal characteristic; and
 - (iii) the applicant mediator will comply with the court's ADR plan, orders of the court regarding cases submitted to mediation, and the standards of conduct adopted by the State Court Administrator under subrule (K).
- (b) The applicant shall indicate on the form whether the applicant is willing to offer evaluative mediation, and the applicant's ~~hourly~~ rate for providing mediation services.
- (c) [Unchanged.]
- (2) *Review of Applications.* The court's ADR plan shall provide for a person or committee to review applications annually, or more frequently if appropriate, and compile a list of qualified mediators.
 - (a) ~~Persons~~ Applicants meeting the qualifications specified in this rule shall be placed on the list of approved mediators. Approved mediators shall be placed on the list for a fixed period of time, not to exceed ~~5~~ seven years, and must reapply at the end of that time in the ~~same manner as persons seeking to be added to the list~~ directed by the court.
 - (b) Selections shall be made without regard to race, ethnic origin, or gender. Residency or principal place of business may not be a qualification.
 - (c) The approved list and the applications of approved mediators, except for the optional section identifying the applicant's gender and racial/ethnic background, shall be available to the public in the office of the ADR clerk.
 - (d) An applicant may attach a résumé or biographical information to the application.
 - (e) A Community Dispute Resolution Program center may appear on a roster of mediators, provided that the center selects only mediators meeting the qualifications of this rule or those training requirements established by the State Court Administrator to mediate cases

ordered by the court.

(3)-(4)[Unchanged.]

(G) Qualifications of Mediators.

(1) To be eligible to serve as a domestic relations mediator under this rule, an applicant must meet the following minimum qualifications:

(a) The applicant must

- (i) be a licensed attorney, a licensed or limited licensed psychologist, a licensed professional counselor, or a licensed marriage and family therapist;
- (ii) have a master's degree in counseling, social work, or marriage and family therapy;
- (iii) have a graduate degree in a behavioral science; or
- (iv) have five years experience in family counseling.

(b) The applicant must have completed a training program approved by the State Court Administrator providing the generally accepted components of domestic relations mediation skills.

(c) Upon completion of the training required under subrule (G)(1)(b). ~~The applicant must have~~ observed two domestic relations mediation proceedings conducted by an approved mediator, and ~~have~~ conducted one domestic relations mediation to conclusion under the supervision and observation of an approved mediator.

(2)-(4)[Unchanged.]

(H)-(K)[Unchanged.]

Staff comment: The proposed amendments of Rules 2.403, 2.404, 2.410, and 2.411 would revise and update the court rules relating to mediation and case evaluation as

recommended by the Dispute Resolution Rules Committee convened by the State Court Administrative Office. The committee's report can be found at <http://courts.michigan.gov/scao/resources/publications/reports/DRRCReport2008.pdf>. The proposal also contains proposed changes of MCR 3.216 recommended by staff to reflect the changes suggested by the committee of the other rules in the proposal.

Please note that the proposed order contains alternative options for MCR 2.403(M)(1). Alternative A, recommended by the committee, would allow subsequent claims to be raised following disposition pursuant to case evaluation, if the claim had not arisen at the time of case evaluation, including in cases that involve personal protection benefits under MCL 500.3101 *et seq.* Alternative B would allow subsequent claims to be brought only in PIP cases; in all other cases, the acceptance of a case evaluation award would be deemed to dispose of all claims in a case, including any that might arise after case evaluation.

The staff comment is not an authoritative construction by the Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on this proposal may be sent to the Supreme Court Clerk in writing or electronically by March 1, 2009, at P.O. Box 30052, Lansing, MI, 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File Nos. 2005-05 and 2006-20. Your comments and the comments of others will be posted at: www.courts.mi.gov/supremecourt/resources/administrative/index.htm.



I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

November 25, 2008

A handwritten signature in cursive script, reading "Corbin R. Davis".
Clerk